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No.....

In the Supreme Court of the United States

October Term 1971

In the Matter of VISTA LINER COACH & TRAILER, INC., *Bankrupt,*

JOHN H. ALLEN, TRUSTEE, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

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No.....

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In the Matter of VISTA LINER COACH & TRAILER, INC., *Bankrupt,*

JOHN H. ALLEN, TRUSTEE,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled case on September 8, 1971.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 447 F.2d 497. A copy thereof is appended to this Petition in Appendix A. The memoradum-opinion of the Referee in Bankruptcy of the United States District Court for the District of Utah is unreported, but appended to this Petition in Appendix B.

JURISDICTION

The Judgment of the United States Court of Appeals for the Tenth Circuit was made and entered on September 8, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

The Judgment of the Court of Appeals reversed a determination by the Referee in Bankruptcy for the District of Utah holding the United States liable to the Trustee in Bankruptcy upon his counterclaim for funds erroneously paid by the bankrupt for illegal manufacturer's excise chassis taxes within one year prior to Bankruptcy. The rationale of the Referee was that each statutory element under Section 67d of the Bankruptcy Act was present to justify the conclusion that the payments to the United States of the illegally imposed manufacturer's excise chassis taxes constituted transfers in fraud of creditors under the Bankruptcy Act. Thus, the United States was the recipient of a voidable transfer within the meaning of Section 57g of the Bankruptcy Act and,

having waived its sovereign immunity by filing its claim with the Bankruptcy Court, was subject to the summary jurisdiction of that court for all purposes, including affirmative relief under the doctrine announced by this Court in *Katchen v. Landy*, 382 U.S. 323, 86 S.Ct. 467, 15 L.Ed.2nd 391 (1966).

The Court of Appeals, in reversing the decision below, in effect held that the Bankruptcy Court may adjudge neither affirmative relief nor set off against the sovereign since payment of the manufacturer's excise chassis taxes can never be a transfer in fraud of creditors. Cf., *United States v. Roth*, 164 F.2d 575 (2nd Cir., 1948).

The questions presented by the instant case, broadly stated, are:

> "1. Upon the filing of a proof of claim by the sovereign, does a Court of Bankruptcy have summary jurisdiction to compel the sovereign to surrender pre-Bankruptcy transfers voidable under the Bankruptcy Act.
>
> 2. Whether the payment of illegal taxes to the United States may constitute a transfer in fraud of creditors within the meaning of the Bankruptcy Act."

STATUTES INVOLVED

The pertinent portions of the Bankruptcy Act of 1938, as amended, and of the Internal Revenue Code of 1954, as amended, are set forth in Appendices C and D respectively.

STATEMENT OF THE CASE

The bankrupt was engaged in the business of manufacturing campers to be placed in pickup trucks. The bankrupt was adjudicated upon its voluntary petition filed on March 22, 1965. The United States filed its claim asserting an indebtedness on the part of the bankrupt originally for manufacturer's excise chassis taxes and withholding of income and FICA taxes. Subsequently and after numerous modifications and amendments, the United States eliminated from its proof of claim its claim for unpaid manufacturer's excise chassis taxes assessed against the campers, which it now concedes were never legally due and owing from the bankrupt. The United States recognized that the bankrupt was not liable for payment of these taxes following the decision in *King Trailer Co. v. United States*, 350 F.2d 947, (9th Cir. 1965).

To the claim of the United States, Trustee filed his Objections, Reply and Counterclaim, seeking to recover funds erroneously paid for manufacturer's excise chassis taxes by the bankrupt within one year prior to Bankruptcy at a time when the bankrupt was insolvent, and to expunge the Government's claim unless such funds were surrendered. Trustee's Objection and Counterclaim were made under the authority of Section 57g of the Bankruptcy Act (11 U.S.C. Sec. 93g) on the theory that the payment by the bankrupt to the United States constituted a transfer in fraud of creditors within the meaning of Section 67d of the Act (11 U.S.C. Sec. 107d).

The Government resisted below on the theory that the Counterclaim of the Trustee was in substance a claim

for tax refund and accordingly subject to the statutory conditions precedent, none of which were admittedly complied with by the Trustee. The Government further asserted that the Bankruptcy Court was without power to award an affirmative judgment against the United States, under any view of the trustee's claim. Such a judgment, it was argued, violated the sovereign immunity of the United States, there having been no consent given to be sued in the manner in which the trustee prosecuted his counterclaim below. The Government further argued that a payment of a tax, believed to be valid at the time paid, could never constitute a transfer in fraud of creditors and that accordingly, the Bankruptcy Court did not have summary jurisdiction to adjudicate the counterclaim of the trustee.

After trial before the Referee in Bankruptcy, the Bankruptcy Court concluded that the payment of these taxes constituted a transfer in fraud of creditors within the meaning of Section 67d of the Bankruptcy Act, all of the statutory elements therefor being present. The Court further concluded that the United States had consented to the award of affirmative relief by having filed its claim in the Bankruptcy Court. Accordingly, the Bankruptcy Court entered Judgment against the United States for the sum of $69,438.13, the aggregate of the sums erroneously paid by bankrupt for manufacturer's excise chassis taxes within one year prior to Bankruptcy when insolvent. The Bankruptcy Court thus applied to the sovereign the doctrine of this court's decision in the case of *Katchen v. Landy*, supra. It was there held that the Bankruptcy Court not only has summary jurisdiction to hear and determine the merits of a 57g objec-

tion to the proof of claim filed, but also the power to compel by way of affirmative relief a surrender of the voidable preference or transfer complained of.

On Petition for Review, the District Judge affirmed the Referee's decision, without opinion. On Appeal, the Court of Appeals for the Tenth Circuit reversed, holding, in effect, that the payment by the Bankrupt of manufacturer's excise chassis taxes, though illegally imposed, could not constitute a transfer in fraud of creditors voidable under the Bankruptcy Act.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals should be reviewed because the instant case raises an important question having a substantial impact on Bankruptcy administration, to wit: the constant and perplexing question of the extent of the Bankruptcy Court's jurisdiction over the sovereign claimant.

The Tables of Bankruptcy Statistics compiled by the Administrative Office of the United States Courts pursuant to Section 53 of the Bankruptcy Act show that for the fiscal year ending June 30, 1969, there was $11,220,470.00 paid to priority tax claimants in asset cases concluded under the Bankruptcy Act. For the same fiscal year, wage claimants received $2,029,528.00; other priority claimants received $1,448,594.00; and unsecured creditors generally received $30,810,542.00, with other payments during the same period totalling $3,681,785.00. From the foregoing figures, the United States, State and local taxing agencies received during the fiscal year ended June 30, 1969, approximately

22.8% of all funds disbursed in Bankruptcy cases for other than administrative fees and expenses and payments to secured creditors. In addition thereto, it is likely that the United States substantially shared in the payments to priority creditors other than tax claimants under its fifth priority for debts other than for taxes. Bankruptcy Act, Section 64a (11 U.S.C. Sec. 104).

Since the Federal, State and local taxing agencies are relatively few in number compared to the vast number of unsecured claimants in Bankruptcy, it is evident that the creditor whose claim must most often be scrutinized, considered and passed upon in a Bankruptcy proceeding is the sovereign claimant. Yet, considerable uncertainty still surrounds the legal status in Bankruptcy of the sovereign claimant.

It has been settled by this court's decision in the case of *Katchen v. Landy*, supra, that the Bankruptcy Court not only has summary jurisdiction to hear and determine the merits of an objection under Section 57g of the Bankruptcy Act (11 U.S.C. 93g) to a non-sovereign claim, but also the power to compel by way of affirmative relief the surrender of the voidable preference or transfer alleged to have been made to the claimant. The question remains for decision as to whether or not the doctrine of *Katchen v. Landy* applies to a claim filed by the sovereign.

The Court of Appeals held that the transfer complained of by the Trustee was not a transfer in fraud of creditors because of the nature of the tax involved. The court did not reach the issues of whether such tax payment nevertheless fit the definition of transfers in fraud of creditors under Section 67d of the Bankruptcy Act,

and if so, whether the Bankruptcy Court would have summary jurisdiction to require the sovereign claimant to disgorge such payments. Compare, *United States v. Roth*, supra, where the Court of Appeals for the Second Circuit held that a Trustee in Bankruptcy did not have the right to set off against a tax claim of the United States a tax payment made by the bankrupt while insolvent for the benefit of a corporation in which he was interested. The Trustee did not raise nor did the court consider Section 57g. The Court there held that the required mutuality was lacking for a set off stating as follows:

> "With respect to the other set-off we are constrained to reach a different conclusion. The right the trustee asserts against the United States is based on the fact that the bankrupt, while insolvent, paid the United States $1,500 to be appled upon the tax liability of a corporation in which he was interested; *in other words, the bankrupt made a transfer in fraud of his creditors.* As between the bankrupt and the United States the payment was voluntary and was beyond recall by the transferor. See *Dent v. Ferguson*, 132 U.S. 50, 64, 66, 10 S.Ct. 13, 33 L.Ed 245. *Schermerhorn v. De Chambrun*, 2 Cir., 64 F.195; *Drake v. Thompson*, 8 Cir., 14 F.2d 933, 935. The right which the trustee asserts to avoid the transaction is not a right of the bankrupt to which he has succeeded, but a right which Sec. 67, sub.d (2) of the Bankruptcy Act, 11 U.S.C.A. Sec. 197, sub.d (2), conferred upon the trustee for the benefit of creditors. The tax claim asserted by the United States was owed by the bankrupt, while the debt it owes, if the $1,500 payment is avoided, is owed to the trustee and was never owed to the bankrupt." (Emphasis added.)

The Referee in Bankruptcy, in his Memorandum Decision below, which is appended to this petition, has carefully reviewed those cases of significance as they relate to the question raised in the instant case. Of the four cases reviewed by the Referee, only the *Ward* case (*In Re Ward*, 131 F.Supp. 387 (Colo. 1955)), permits affirmative relief against the United States by way of counterclaim in the Bankruptcy proceeding. The *Danning* case (*Danning v. United States*, 259 F.2d 305 (9th Cir. 1958)) while acknowledging that the United States has been cast by the Bankruptcy Act in the same mold as any other creditor, at least for purposes of set off, nevertheless declines to make the comparison constant to the extent of permitting affirmative relief to be granted against the sovereign. To the same effect see, *In Re Greenstreet, Inc.*, 209 F.2d 660 (7th Cir. 1954). The *Roth* case (*United States v. Roth*, supra) was not required to reach the question of whether or not the lack of distinction created by the Chandler Act between the sovereign and a private creditor breaks down once affirmative relief is sought. The *Roth* case, however, represents the earliest case on the subject which permits a set off against the Government, holding that this does not do violence to the sovereign immunity of the United States because of the 1938 Chandler Act Amendments to the Bankruptcy Act. Of the four cases reviewed by the Referee only *Techcraft* (*In Re Techcraft, Inc.*, 177 F.Supp. 790 (S.D.N.Y. 1959)) considered a 57g objection to the claim of the sovereign. It was there held that 57g was applicable to the United States and that therefore, the Referee had jurisdiction to expunge the sovereign's claim unless it first paid over the amount alleged to be a voidable preference.

Does the doctrine of *Katchen v. Landy* apply to the sovereign? Can payments otherwise denominated as taxes constitute transfers voidable under the provisions of the Bankruptcy Act where all elements thereof are found to be present? These questions unless answered, will continue to confront every trustee and every trustee's attorney who maye be involved in processing sovereign claims for payment. These are issues that have a substantial impact upon the administration of the Bankruptcy Act. This court should definitively resolve these issues; and the instant case affords a vehicle for the accomplishment of that end.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for Writ of Certiorari should be granted.

Respectfully submitted this ..... day of December, 1971.

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APPENDIX A

United States Court of Appeals
Tenth Circuit

NO. 447-70 — JULY, 1971 TERM

In the Matter of

VISTA LINER COACH & TRAILER, INC.,

Bankrupt,

UNITED STATES OF AMERICA,

Appellant,

v.

JOHN H. ALLEN, TRUSTEE,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

(D.C. #B-308-65)

Karl Schmidler, Attorney, Tax Division, Department of Justice (Johnnie M. Walker, Assistant Attorney General, Joseph M. Howard and Crombie J. D. Garrett, Attorneys Tax Division, Department of Justice, and C. Nelson Day, United States Attorney, of Counsel, with him on the Brief), for Appellant.

Herschel J. Saperstein, of Draper, Sandack & Saperstein, Salt Lake City, Utah, for Appellee.

Before HILL, SETH and DOYLE, Circuit Judges.

SETH, Circuit Judge.

The United States has taken this appeal from a judgment entered against it in the bankruptcy proceedings of Vista Liner Coach & Trailer, Inc.

The bankrupt was in the business of manufacturing campers to be placed on pickup trucks. The campers were designed primarily as living accommodations for travelers and vacationers. The United States filed a claim in 1965 against the bankrupt estate for unpaid withholding taxes, FICA taxes, and for unpaid excise taxes on the campers. In September 1966 the trustee filed objections to the claim, and further objections were thereafter made by the trustee to the excise tax claim on the grounds that these taxes were never legally owed. The claim was amended several times and as finally asserted was in the amount of $9,569.76, and did not include excise taxes.

In March 1967 the trustee asserted a claim against the United States for excise taxes which had been levied on the sale of campers and which had been paid by the bankrupt. These excise taxes had been paid for the most part between March 9, 1964, and February 18, 1965, in accordance with section 4061(a)(1) of the Internal Revenue Code of 1954. The total amount so claimed by the trustee was $69,438.13. The company had been adjudicated a bankrupt on March 22, 1965, and in the proceedings here under consideration the referee had found the company to have been insolvent at the time it paid the taxes which were the subject of the trustee's claim.

On September 7, 1965, the case of United States v. King Trailer Co., 350 F.2d 947 (9th Cir.), was decided, and the court there held that pickup coaches or campers of the same type as manufactured by the bankrupt were not, and had not been, subject to the excise tax levied under section 4061(a) (1) of the Code. The court held they were not the body type contemplated in the section. Following this decision the Government ceased attempts to collect the taxes on the sales of campers of this type. The Code in section 6416(a) (1) contains a description of the procedure to be used in applications for refunds of these excise taxes.

As indicated above, the referee held a hearing on the claim and counterclaim, and granted the trustee's claim against the Government. Judgment was entered with interest at eight per cent, and with the proviso that if the amount was not paid within thirty days the claim of the Government against the bankrupt for employment taxes would be disallowed.

The order and judgment of the referee were affirmed by the United States District Court for the District of Utah, and review was denied. This appeal was thereupon taken.

The referee, upon the submission of the claim by the United States and upon the filing of the counterclaim by the trustee against the United States, determined initially whether the bankruptcy court had summary jurisdiction to consider the claim against the United States. The referee found that he did have such jurisdiction and proceeded on the merits and entered judgment as above described. The basis for the referee's determination that he had summary jurisdiction was

that the payment to the Government of the excise taxes by the bankrupt while insolvent constituted a fraud of its creditors. The referee also determined that the Government could assert no claim to sovereign immunity and further that since this was not a claim for a refund, the refund procedure and showing required under the refund section 6416(a) (1) of the 1954 Code need not be followed.

On this appeal the appellant argues that the bankruptcy court did not have jurisdiction because it did not have possession of the assets under section 2(a) of the Bankruptcy Act. Thus it urges the only manner in which the trustee could proceed would be by a plenary proceeding. The appellee-trustee argues that the issues and the facts presented are a variation of the case of Katchen v. Landy, 382 U.S. 323, which was a case also heard by this court. See 336 F.2d 535. As the appellee states, the conclusion by the referee that summary jurisdiction exists depends upon his determination that the payment of the excise taxes were transfers in fraud of creditors, and that sovereign immunity cannot be asserted.

The parties on this appeal are candid in the summary of their positions in their respective briefs. The appellee at the outset states the trustee's position to be:

> "The trustee stands not in the shoes of the bankrupt, but rather in the shoes of existing creditors of the bankrupt seeking to recoup funds that might otherwise have been available for payment of their just claims, but which now constitute a windfall in the hands of the United States which never had either a just or legal claim thereto"

On the other hand, the Government in the statement of its position says:

> "Under such circumstances, the United States has a better claim, both at law and in equity, to hold the fund for payment to these purchasers. Accordingly, there is no merit to the referee's holding . . . that it is fairer to insure that the fund be added to the estate for distribution to creditors who had never borne the incidence of the tax."

What the parties are really acknowledging is that the individual purchasers of the campers have by far the best claim to these funds remitted by the bankrupt, but that as a second best position each asserts its claim is better than that of the other.

It is necessary to give first consideration to the opinion of the Supreme Court in Katchen v. Landy, 382 U.S. 323, as it applies to these circumstances. That opinion, together with the opinion of this court at 336 F.2d 535, demonstrates that the test for summary jurisdiction as there applied is not so much a transaction test, but is instead derived from an examination of the nature of the transfer by the bankrupt, and of the powers and functions of the referee under the Bankruptcy Act. The Supreme Court in its opinion considers the purpose of the Bankruptcy Act, and its administration. The Court in its conclusion indicates that summary jurisdiction is provided in the Act to permit the proper evaluation and allowance of claims in an efficient manner as one of the referee's basic functions and powers. The Court points out that when a claim has been filed against the estate, and the trustee takes the steps necessary to assert a section 57g objection, the referee must examine it to determine the preference question both as to its existence and amount. The objection is necessarily part of the allowance of claim problem, and is subject to the summary

jurisdiction of the bankruptcy court. The Court said in Katchen v. Landy:

> "Our examination of the structure and purpose of the Bankruptcy Act and the provisions dealing with allowance of claims therefore leads us to conclude, and we so hold, that the Act does confer summary jurisdiction to compel a claimant to surrender preferences that under § 57g would require disallowance of the claim."

The Court thus bases its decision on the structure and purpose of the Bankruptcy Act and especially the determination of preferences. The Court in our opinion directs us to examine the nature of the transfer or payment to see whether it falls within the general categories referred to by the Court. These arise from the referee's duties under section 57g and are preferences, transfers in fraud of creditors, setoffs, and voidable liens. The Court said in part in its first footnote and in reference to the decision of this court in Katchen v. Landy:

> "The decision presently under review upholds summary jurisdiction to order return of a preference whether or not the preference relates to the same transaction as the claim but declines to extend such jurisdiction to unrelated counterclaims not involving a preference, set-off, voidable lien, or a fradulent transfer. 336 F.2d, at 537."

The transfer here, the trustee asserts, by its nature falls within the fraudulent transfer category, and thus there is summary jurisdiction. We cannot agree.

The record before us demonstrates that the excise taxes were paid by the bankrupt under a construction of the excise tax section adopted by the Commissioner at the time and in the absence of a determination that the

Act should be otherwise construed. The transaction upon which the excise levy was here made under section 4061 (a) (1) of the Code was on the sale of the campers. This tax is "imposed" on articles sold by the manufacturer. The incidence of the tax was borne by the purchasers, but remittance or payment to the Government was required to be made by the manufacturer. This is the typical manner in which a manufacturer's excise tax is administered.

The section of the Code providing for refunds, and particularly section 6416(a) (1), is significant in a consideration of the nature of the tax. The refund provisions require that the manufacturer demonstrate that the tax was not in fact included in the price of the campers sold and was not otherwise collected from the purchaser thereof, or the manufacturer seeking the refund may show that he has repaid the amount of the tax to the ultimate purchaser or the ultimate vendor, or as another possibility that he has obtained written consent from the ultimate vendor or purchaser to the making of the refund to him. These refund provisions together with the consideration of the nature of the tax as it is described in the Code demonstrate that, in the absence of a contrary showing, it must be assumed that the funds used to make the payments claimed herein by the referee originated with the buyers of the campers as a tax item added to the purchase price of the camper. This in turn indicates that the tax portion was collected at the time of sale by the bankrupt to provide it with funds to remit to the Government, and all at the time when the levy was valid. It is further indicated that if, as was the case here, it was subsequently determined that the tax or levy was de-

fective or illegal, it is, without further showing, the purchaser of the camper who is entitled to the return of the excise tax collected. Under these circumstances the payment by the bankrupt to the United States prior to the invalidation of the taxing act is not a fraud of the creditors of the bankrupt.

As indicated above, the trustee argues also that he has a better claim to the money than does the United States because the tax was ultimately held to be invalid and should not have been paid. The issue before us is however not who has the better claim as between the trustee and the United States, but the question is whether or not the bankruptcy court had summary jurisdiction to enter the judgment it did. We must hold that it did not have such jurisdiction by reason of the fact that the payment of the funds by the bankrupt did not constitute a transaction which was held in Katchen v. Landy to give such jurisdiction.

The trustee relies on United States v. Roth, 164 F.2d 575 (2d Cir.), which held that a tax payment by an individual on a tax liability of a corporation in which he had an interest was a fraud on the creditors of the individual. However, in the case before us the relationships are much different, and the general conclusion in the cited case that a payment of taxes can be a fraud on creditors is not of much assistance in resolving the problem here presented.

The trustee and the referee in his opinion considers the broad language of the Bankruptcy Act relative to transfers and preferences as being applicable to these circumstances. See sections 67(d) (2), 67(d) (1) (e) and 1 (30). However, the precise nature of the particular

transaction under consideration must be examined with regard to the general purposes of the Bankruptcy Act. The argument of the trustee would place all taxes as section 67(d) transfers on lack of fair consideration and thus really proves too much. Payment of taxes cannot be so characterized. The only difference between the excise here paid and other tax payments is that although the tax when paid was considered to be valid and collectible and presumably paid on this basis, it was later decided by the courts that these particular items were not taxable. The court decided that the campers did not come within the general terms of truck or bus "bodies," and thus they were not taxable. Under these circumstances we cannot say that the excise payments so made were sufficiently different from other taxes paid during the same period to be charactrized as a fraudulent transfer. Thus we must hold that the tax payments were not transactions within Katchen v. Landy, and thus to give the bankruptcy court summary jurisdiction over the trustee's claim.

REVERSED.

APPENDIX B

In The United States District Court For The District Of Utah

In Bankruptcy No. B-308-65

MEMORANDUM OPINION

In the Matter of:

VISTA LINER COACH & TRAILER CO.

Bankrupt.

This matter came on for hearing before the undersigned on the 6th day of December, 1968 to consider the priority tax claim of the United States of America as modified and amended seeking payment of $9,567.76 from Bankrupt's estate, Trustee's objections thereto and Trustee's counterclaim against the sovereign claimant seeking to recoup $69,438.13 from claimant alleged by the Trustee to have been transferred by Bankrupt to the sovereign claimant in fraud of creditors.

The following appearances have been entered in this matter:

John H. Allen — Trustee, individually and by and through H. J. Saperstein, Esq., Attorney United States of America — William Thurman, Esq., U. S. Attorney, Gordon Coffman, Esq., Assistant U. S. Attorney, and Robert L. Handros, Esq., Department of Justice.

A statement of the basic factual and legal issues presented by the contest between claimant and Trustee

were incorporated into a pre-trial order. The provisions of such order are set forth verbatim below:

"It is stipulated and agreed by and between the attorney for the trustee and the attorneys for the United States, as follows:

"1. The bankrupt made payments to the United States for application upon an asserted manufacturers excise tax for the first quarter of 1964 (ended March 31, 1964) on the dates and in the amounts as follows:

Date	Amount
March 9, 1964	$4,365.48
April 21, 1964	5,366.18
	Total — $9,731.66

"2. The bankrupt made payments to the United States for application upon an asserted manufacturers excise tax for the second quarter of 1964 (ended June 30, 1964) on the dates and in the amounts as follows:

Date	Amount
May 31, 1964	$ 9,563.88
July 2, 1964	4,508.26
July 16, 1964	19,497.73
	Total — $33,569.87

"3. The bankrupt made payments to the United States for application upon an asserted manufacturers excise tax with penalty and interest, for the third quarter of 1964 (ended September 30, 1964), on the dates and in the amounts as follows:

Date	Amount
November 30, 1964	$ 9,962.51
December 22, 1964	1,174.09
January 28, 1965	5,000.00
February 18, 1965	10,000.00
	Total — $26,136.60

"4. At the times of the payments described above, the articles manufactured and sold by the bankrupt were deemed subject to manufacturers excise tax, by the Internal Revenue Service However, the United States now concedes that such articles were not subject to such tax.

"5. Neither the bankrupt nor the trustee has performed the conditions specified in Section 6416(a) (1) of the Internal Revenue Code of 1954.

II

"The sole issue of fact for decision by the Court is as follows:

"Whether the bankrupt was insolvent at the times of the aforesaid payments.

III

"The issues of law for decision by the Court are as follows:

"1. Whether the counterclaim of the trustee is within the summary jurisdiction of the Bankruptcy Court or requires filing a separate plenary action.

"2. Whether the counterclaim of the trustee is in violation of the sovereign immunity of the United States from suit.

"3. Whether the Court lacks jurisdiction of the counterclaim and the countercliam fails to state a claim upon which relief can be granted, because of failure to perform the conditions specified in Section 6416(a) (1) of the Internal Revenue Code of 1954.

"4. Whether the Court lacks jurisdiction of the counterclaim and the counterclaim fails to state a claim upon which relief can be granted, because of failure to file a claim for refund including a statement in accordance with the provisions of

Section 6416(a) (1) of the Internal Revenue Code of 1954.

"5. Whether the tax payments made by the bankrupt were voidable fraudulent transfers, under Sections 67d and 57g of the Bankruptcy Act.

"Dated at Salt Lake City, Utah, this 22d day of October, 1968.

/s/ Bruce S. Jenkins
Referee in Bankruptcy

APPROVED:

/s/ H. J. Saperstein
Attorney for trustee in Bankruptcy

WILLIAM T. THURMAN
United States Attorney

By: /s/ Gordon C. Coffman
Assistant United States Attorney

/s/ Robert L. Handros
Attorney, Dept. of Justice
Washington, D. C."

At the time of hearing, the Trustee presented testimony in support of his allegation of the insolvency of Bankrupt covering the period between March 1, 1964 and February 18, 1965, the period in which payments characterized by Trustee as "transfers", and by the United States as "tax payments", were made by the Bankrupt corporation to the United States of America.

Five persons testified. Myron Berryman, CPA, whose firm did tax work for the Bankrupt prior to liquidation; L. P. King, CPA, who investigated the financial condition of Bankrupt in July, August and September of 1964 on behalf of a prospective purchaser of the company; George Baker, an employee of Bankrupt, who worked in purchasing and production for

Bankrupt and who at one time was a prospective purchaser of the company; O. C. Barrus, a principal shareholder and President of Bankrupt; and John H. Allen, Trustee.

Mr. Berryman, CPA, testified as to the creation of Exhibit #1, a working copy of a tax return with a balance sheet prepared by him incorporated therein purporting to reflect the condition of the Bankrupt as shown by its books and records as of September 30, 1963. According to Exhibit #1, the Bankrupt as of September 30, 1963 had assets of $271,192.78, liabilities of $269,747.89, and a net worth of $1,344.89.

Mr. L. P. King, CPA, as a result of his examination of the company's books and records and operations on behalf of a client who was then considering whether or not to purchase the company, prepared a balance sheet of Bankrupt as of July 30, 1964, at which time no *physical* inventory was made by him (but inventory was projected), and a balance sheet of Bankrupt as of September 30, 1964, at which time a physical inventory was made by him. These are Exhibits #2 and #3.

The July, 1964 balance sheet shows an excess of liabilities over assets; i.e., a negative net worth of $117,509.43. The August, 1964 balance sheet shows an excess of liabilities over assets; i.e., a negative net worth of $92,334.00. Mr. King testified in his opinion such balance sheet statements were fair representations of the books and records of the Bankrupt at the respective times the balance sheets were prepared.

Mr. King testified that such balance sheets reflected the condition of the company as set forth in the books and records of the company on the dates indicated.

Mr. King further testified "xxx there is no question that the net worth deteriorated from the plus $1,300.00 to a minus $92,334.00 during the period October 1, 1963 and September 30, 1964", but Mr. King freely acknowledged that no specific date could be pinpointed within that time when such transaction took place.

Mr. George Baker, a long-time employee of Bankrupt in purchasing and production, and himself a prospective purchaser when the company assets were sold in liquidation, and a man of experience in the field, testified that in his opinion the equipment as listed in the various balance-sheets at book value were markedly over-valued as far as the actual worth of the equipment was concerned. He testified the actual tools and equipment used in manufacture which listed at book at some $33,000.00 were worth about $3,000.00 at fair resale value.

Mr. O. C. Barrus, former President, who during the period of financial crisis prior to the filing of the petition in bankruptcy, pledged personal property and obtained personal loans to shore up Bankrupt's sagging fortunes, testified that in spite of his personal activity that the financial condition of the company went "from bad to worse".

The bankruptcy statements and schedules were introduced as Exhibit #5 without objection, and themselves buttress Trustee's assertion as to Bankrupt's status of insolvency during the period in question.

§67(d) (1) is a unique section of the Bankruptcy Act resulting from an effort to incorporate into the Act sections comparable to those contained in the so-called

Uniform Fraudulent Conveyances Act and thus achieve a semblance of uniformity between local and federal law in this peculiar area.

This provision of the Act contains its own definition of "insolvency" to be applied when dealing with the question of fraudulent transfers or conveyances.

§67(d)(1)(d) provides:

> "A person is 'insolvent' when the present fair salable value of his property is less than the amount required to pay his debts; xx xx."

The evidence as presented by Trustee well supports the Trustee's contention that Bankrupt was insolvent beginning March 9, 1964 the date of the initial "transfer" and that at no time thereafter did Bankrupt become solvent. Based on abundant and substantially uncontested evidence, I find such to be the fact.

As set forth in the pre-trial order above, the parties have stipulated that the "payments" *were made by Bankrupt* to the United States. Such payments were made during a period when the Bankrupt was insolvent.

Are such payments "transfers" within the meaning of the Act? If so, are such payments voidable pursuant to §67(d) and 57(g) of the Act?

§1(30) provides:

> " *'Transfer' shall include* the sale and *every other* and different *mode*, direct or indirect, of disposing of or *parting with property* or with an interest therein or with the possession thereof or of fixing a lien upon property or upon an interest therein, absolutely or conditionally, *voluntarily or involuntarily*, by or or without judicial

proceedings, as a conveyance, sale, assignment, *payment,* pledge, mortgage, lien, encumbrance, gift, security, or otherwise; the retention of a security title to property delivered to a debtor shall be deemed a transfer suffered by such debtor." (emphasis added)

The pertinent provisions of §67(d)(2) provides:

"*Every transfer made* xxx by a Debtor *within* 1 *year prior* to the filing of a petition initiating a proceedings under this act by or against him is *fraudulent* (a) as to creditors existing at the time of such transfer xxx *if made or incurred without fair consideration by a Debtor who is xxx insolvent, without regard to his actual intent*".

§67(d)(1)(e) provides:

"Consideration given for the property or obligation of a debtor is 'fair' (1) when, in good faith, *in exchange* and as a *fair equivalent* therefor, property is transferred or an antecedent debt is satisfied, or (2) when such property or obligation is received in good faith to secure a present advance or antecedent debt in an amount *not disproportionately small* as compared with the value of property or obligation obtained".

The initiating petition herein was filed March 22, 1965. Payments or transfers made prior to March 22, 1964, even if fraudulent, would not be reachable by Trustee, being barred by the one year limitation period set forth in §67(d)2 of the Act. Thus the payment of March 9, 1964 of $4,365.48 would be beyond the limitation period and beyond recoupment by Trustee because of the passage of time.

The sovereign claims that no cause of action ever matured against the sovereign because neither Bankrupt nor Trustee did those thinges required by 6416(a)(1)

of the Internal Revenue Code;(1) that the bankruptcy forum is not the appropriate forum for determining or compelling a tax refund and that even if the cause of Trustee has merit, the bankruptcy forum is without power to render and enforce an affirmative judgment against the sovereign because of sovereign immunity.

This cause relied upon by Trustee in his counterclaim is that which is defined in §67(d) of the Bankruptcy Act.

This is a specific, distinct and unique cause of action defined by the Congress and created as a device to insure the fair sharing among creditors of the reachable assets of a Bankrupt. Indeed, the preservation of the interest of creditors of like status is the over-riding policy consideration for the enactment of this section.

The operative elements of §67(d) are "insolvency", "transfer" of property and the failure of Bankrupt to receive a "fair equivalent" from transferee in return for that which is transferred when insolvent.

This is a different cause of action created by a different statute implementing different policy con-

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(1) 6416(a)(1): "Certain taxes on sales and services (a) Condition to allowance - (1) General rule. - No credit or refund of any overpayment of tax imposed by chapter 31 (retailers taxes), or chapter 32 (manufacturers taxes) shall be allowed or made unless the person who paid the tax establishes, under regulations prescribed by the Secretary or his delegate, that he - (A) has not included the tax in the price of the article with respect to which it was imposed and has not collected the amount of the tax from the person who purchased such article; (B) has repaid the amount of the tax to the ultimate purchaser of the article; (C) in the case of an overpayment under subsection (b)(2), (b)(3)(C), or (b)(4) of this section - (i) has repaid or agreed to repay the amount of the tax to the ultimate vendor of the article, or (ii) has obtained the written consent of such ultimate vendor to the allowance of the credit or the making of the refund; or (D) has filed with the Secretary or his delegate the written consent of the person referred to in subparagraph (B) to the allowance of the credit or the making of the refund".

siderations and concerned with different "interested parties" and providing for different remedies than a cause of action which could arise under the Internal Revenue Code to recover the overpayment of a tax by a solvent debtor or its successor Trustee.

The element of insolvency is a requisite of any action which can arise under §67(d). Insolvency is not a requisite of the action which can be pursued under 6416(a) of the Internal Revenue Code.

"Other creditors" must exist at the time of transfer under 67(d). Indeed 67(d) of the Act was created to protect the interest of such co-existing creditors in the assets of an insolvent. The existence of "other creditors" is not a requisite of 6416(a)(1) of the Internal Revenue Code.

Disproportionate consideration must exist under 67(d). Disproportionate consideration is not an element of 6416(a)(1).

6416(a)(1) of the Internal Revenue Code is primarily an accounting procedure for determining tax overpayment. Were this matter primarily an accounting procedure involving a tax overpayment of a *solvent* debtor to which Trustee succeeded, then the requirements of 6416(a)(1) and related regulations could well eb applicable. But such is not *this* case.

This distinction of causes is further demonstrated by the fact that the cause raised by the Trustee by way of counterclaim is not simply a cause initially vested in debtor to which the Trustee fell heir, - the cause asserted is original and unique with Trustee and vested

initially in Trustee and not with the debtor. The cause is created by the Congress through statute.

§67(d)6 in part provides *"a transfer made* xxx by a debtor adjudged a bankrupt under this act, *which is fraudulent under this subdivision (d) against creditors shall be null and void against the Trustee xxx"*. (emphasis added)

There are instances where debtor, standing alone, may be bound by a bargain which a "defrauded" creditor or a bankruptcy Trustee can cause to be set aside. This distinction of causes is further buttresed by the fact that "consideration" as used in 67(d) is not used in the classic sense as something sufficient to support a contract but in the sense of *equivalent value* with the purpose of preserving the asset picture of an insolvent debtor in approximately the same status after a transfer as before a transfer - not to protect the debtor but to protect the *creditors* of an insolvent debtor.

The Congress has said that when a debtor is insolvent is it unfair for one creditor of a class to feast and the remainder of equal status to famine; that one have substantially everything and the remainder substantially nothing merely because an "unfair" transfer has taken place.

This section of the Act is designed to *restore* the asset status of an insolvent to its condition prior to a transfer and thus to promote fair sharing by *all creditors* of the same class in the reachable assets of an insolvent and thus preclude windfalls and disproportionate sharing by a select or favored few.

The Congress goes so far in 67(d) as to say it

is unconcerned with the actual state of mind of the transferor. The Congress is deeply concerned with fairness and equity to all creditors and hence, the requisite of "fair consideration".

Where the elements of a 67(d) transfer are made out, it is the manifest unfairness to *similarly* situated pre-transfer creditors which prompts the Congress to use the word fraud to characterize such a transfer. "Unjust enrichment" would perhaps have been a better word.

In the instant fact situation, the extinguishment by the sovereign of an erroneously imposed tax obligation may have been consideration in the contract sense, but it was not "fair" consideration within the meaning of 67(d)(1).

In this case, the Trustee for the use and benefit of Bankrupt's creditors wants the sovereign claimant to be ordered to disgorge $69,438.13 and ordered to return the sums erroneously received by it and seeks judgment in this Court to that end or, at the very least, that this Court deny the sovereign claimant opportunity to participate in this estate until such time as it pays into Court for the benefit of all creditors those monies received by it through error and without "fair consideration".

The sovereign wants to keep the money erroneously received from the Bankrupt. Indeed, the sovereign not only wants to keep the $69,438.13 which it got for nothing, it has asked this Court to authorize the payment from the estate of the Bankrupt the additional sum of $9,564.76 for employment taxes allegedly owed

by Bankrupt at the time the initiating petition was filed in this Court.

The counterclaim of Trustees well states a cause of action against claimant under 67(d) of the Bankruptcy Act. The requisite elements are present in law and in fact.

This in no way is in conflict with 6416(a) of the Internal Revenue Code. Rather than pursue a cause debtor may have had to which Trustee fell heir, Trustee elected to pursue a cause vested by statute in Trustee and it is that cause which he has adequately demonstrated in law and in fact. 6416(a) of the Internal Revenue Code doesn't repeal 67(d) of the Bankruptcy Act. Both live and have meaning in their own contexts.

Having found that the transfers are fraudulent within the meaning of 67(d) and having found that Trustee's counterclaim states a cause of action against the claimant in law and in fact, we must now deal with the contentions of the sovereign claimant that the bankruptcy forum is not the appropriate forum for determining the scope and extent of Trustee's claim against the United States, and the further defense that such forum is without power to render a judgment on the matter or to enforce a judgment once rendered because the sovereign, being sovereign, is immune and has not consented to such an exercise of power.

Such defenses deal with fundamental questions and merit exploration in depth.

What is the *power* of the Bankruptcy Court to deal with claims, objections to claims, and counterclaims against the claimant? What is the *power* of the Bank-

ruptcy Court to deal with sovereign claims, objections to sovereign claims and counterclaims against the sovereign?

By jurisdiction I mean the power of the Bankruptcy Court to pronounce what the law is and the power to enforce such pronouncement.

By "claim" I refer to the assertion by a claimant in Bankruptcy Court that Bankrupt is indebted to him and by implication that claimant is entitled to share in estate proceeds, the form and content of which are prescribed by §57 of the Act and General Order 21 and Official Forms.(2)

There are five separate definitions of "claim" found in the Bankruptcy Act.(3) No statutory definition as such is found in the liquidation segment of the Act (Chapters I - VII).

The Congress, as part of the prescribed method for insuring "fair sharing by creditors in the proceeds of a Bankrupt's estate, has placed the burden on those who claim an interest therein to call their claim to the attention of the Court by filing with the Court an appropriate written assertion. The initiative for filing lies with the

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(2) Bankruptcy Act of 1898 as amended. §57(a)(11 U.S.C. 93 (a)) "A proof of claim shall consist of a statement, in writing and signed by a creditor, setting forth the claim; the consideration therefor; whether any and, if so, what securities are held therefor; and whether any and, if so, what payments have been made thereon; and that the claim is justly owing from the bankrupt to the creditor. A proof of claim filed in accordance with the requirements of the Bankruptcy Act, the General Orders of the Supreme Court, and the official forms, even though not verified under oath, shall constitute prima facie evidence of the validity and amount of the claim".
General Order 21.
Official Forms 28, 29, 30, 31.

(3) Bankruptcy Act of 1898 as amended. 77(b) (11 U.S.C. 205); 106(1)(11 U.S.C. 506); 307(2)(11 U.S.C. 707); 406(2) (11 U.S.C. 806); 606(1)(11 U.S.C. 1006).

claimant, be he sovereign or not. He may file or not at his option. The time in which he may file a proof of claim is limited.(4)

The Congress, in express language, has said that the Bankruptcy Court may "allow claims, disallow claims, reconsider allowed or disallowed claims and allow or disallow them against bankrupt estates".(5)

The nature of such power has been examined often but with no more eloquence and understanding than by the United States Supreme Court in the landmark case of Pepper v. Litton.(6)

In Litton, the Court emphasized that in passing on claims the Bankruptcy Court "sits as a court of equity".

At page 305, the Court, speaking of the Bankruptcy Court, states that it has broad equity powers and that such powers have

> "xxx been invoked to the end that *fraud will not prevail, that substance will not give way to form, that technical considerations will not prevent substantial justice from being done.* By reason of the express provisions of §2(a) these equitable powers are to be exercised in the allowance of claims, a conclusion which is fortified by 57(k)".
>
> "'Hence' says the Supreme Court, xxx a bankruptcy court has full power to inquire into the

(4) 78n of the act (11 U.S.C. 93n) states in part, "Except as otherwise provided in this act, all claims provable under this act, including all claims of the United States and of any state or subdivision thereof, shall be proved and filed in the manner provided in this section. Claims which are not filed within six months after the first date set for the first meeting of creditors shall not be allowed; Provided, xxx "stating provisions. But see 378(4)(c) of the Act (11 U.S.C. 778(c)).

(5) 2a(2)(11 U.S.C. 11a(2)); 38(6)(11 U.S.C. 66(6)).

(6) Pepper v. Litton (1939), 308 U.S. 295 (84 L.ed. 281) (60 S.C. 238).

validity of any claim asserted against the estate and to disallow it if it is ascertained to be without lawful existence. (*Lesser v. Gray,* 236 *U.S.* 70). And the mere fact that a claim has been reduced to judgment does not prevent such an inquiry. As the merger of a claim into a judgment does not change its nature so far as provability is concerned. (*Boynton v. Ball,* 121 *U.S.* 457) so the court may look behind the judgment to determine the essential nature of the liability for purposes of proof and allowance. (*Wetmore v. Markoe,* 196 *U.S.* 68). It may ascertain the validity of liens, marshal them, and control their enforcement and liquidation. (*Isaacs v. Hobbs Tie & Timber Co.,* 282 *U.S.* 734). And the bankruptcy trustee may collaterally attack a judgment offered as a claim against the estate for the purpose of showing that it was obtained for the collusion of the parties or is founded upon no real debt".

And in Pepper v. Litton, the Court, at page 304 states: "In such respect the jurisdiction of the bankruptcy court is exclusive in all other courts. United States Fidelity & Guaranty Co. v. Bray, 225 U.S. 205, 217".

Though said to be exclusive and broad, this is not to say that the power to allow and disallow claims is without limits. The Court is expressly limited by certain specific provisions of the Act which have meaning in this case.

§57(g) of the Act says, "*The claims of creditors who have received* or acquired preferences, liens, conveyances, *transfers,* assignments or encumbrances, *void or voidable* under this *Act, shall not be allowed, unless such creditors shall surrender such* preferences, liens,

conveyances, *transfers*, assignments or encumbrances." (Emphasis added).

§47(8) of the Act expressly provides that the trustee "*shall examine all proofs* of claim *and object to the allowance of such claims as may be improper.*"

Thus; the Trustee has the duty to call to the attention of the Court "improper" claims and the Court thereupon has the duty to set down and hear and resolve the same "as the convenience of the Court and the best interests of the estate and claimants will permit."(7)

Pursuant to this duty, Trustee has raised his objections to the propriety of the claim filed asserting that claimant is a non-disgorging transferee and thus the Court is without power to allow such a claim absent surrender of the transfer.

While allowance and disallowance of claims is one of the powers and functions of the Bankruptcy Court, it isn't the only one. Often the Court is called upon to perform other functions and to exercise other powers, and to do so at *the same time allowance and disallowance of claims is going on.* The Court has the power, indeed the duty to

"Cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided . . ."(8)

And an oft forgotten section of the Act states that the Court can

(7) 57(f) (11 U.S.C. 93f).
(8) 2a(17); (11 U.S.C. 11a(7)).

"Make such orders, issue such process, *and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this Act*; Provided, however, that an injunction to restrain a court may be issued by the judge only."(9) (Emphasis added)

It is settled that a Bankruptcy Court has power to grant a judgment for affirmative relief against a claimant who has filed a claim in a bankruptcy proceeding on Trustee's counterclaim to such claim filed in such proceeding to recover a preference, set-off, fraudulent transfer or to void a lien when such preference, set-off, fraudulent transfer or voidable lien would require disallowance of such claim.(10)

Katchen arose in the Tenth Circuit.(11) An ancestor of Katchen was Interstate National Bank of Kansas City v. Luther, Trustee,(12) a case wherein the Tenth Circuit had taken a position as to the power of the Bankruptcy Court to entertain and dispose of Trustee asserted counterclaims. In Katchen, the Tenth Circuit in the words of Chief Judge Murrah, summarized the Interstate case and doctrine at page 336 of the Tenth Circuit opinion:

> "In Inter-State, we upheld the power of the Bankruptcy Court to entertain a counterclaim to fully adjudicate and recover a 57 sub g preference, whether such counterclaim is compulsory

(9) 2a(15); (11 U.S.C. 11a(15)).

(10) Katchen v. Landy, 382 U.S. 323 (1966) (15 L.ed. 2d 391) (86 S.C. 467).

(11) Katchen v. Landy, 336 F.2d 535 (1964).

(1) Interstate National Bank of Kansas City v. Luther, Trustee, 221 F.2d 382, Cert. granted 350 U.S. 810, 76 S.C. 77, 100 L.ed. 726, Cert. dismissed by stipulation of parties, id., 944, 76 S.C. 297, 100 L.ed. 823.

under rule 13a or permissive under rule 13b FRPC. A majority of the court en bank took the view that the filing of a claim in bankruptcy operates to invoke the court's exclusive jurisdiction under 2 sub a. (2) to sift the circumstances surrounding any claim or to disallow it, according to *equitable* precepts.

> "And, more specifically, the filing of the claim in bankruptcy operates to invoke the courts concurrent jurisdiction, with the state courts under 60 sub b. to fully adjudicate and recover any voidable preferences. (citing cases). We were further of the opinion that the right of plenary suit being procedural, may be waived i.e. see O'Dell v. United States, 10 CA 326 F.2d 451, and having voluntarily invoked the summary jurisdiction of the bankruptcy court, the claimant could not thereafter limit the exercise of that jurisdiction over the subject matter by objection thereto."

The Circuit Court in Katchen then reviewed other cases which had not gone as far as Interstate, and then went on to say:

> "Upon reconsideration of Interstate, in the light of subsequent decisions and commentary, we have decided to adhere to its pronouncements. But, *we decline to extend the summary jurisdiction of the Court by implied consent to counterclaims which do not involve a preference, set-off, voidable lien or a fraudulent transfer, and which are wholly unrelated to creditors claim. Claims of this nature are notwithin the Referees summary jurisdiction, and a claimant does not consent to the exercise of the bankruptcy court's plenary jurisdiction by filing his claim in the bankruptcy proceedings* . . . . . (emphasis added)

The Supreme Court affirmed the Tenth Circuit and affirmed that the Bankruptcy Court could, and indeed

must, consider appropriately raised 57(g) objections and objections to a claim which arise out of the same transaction and that in so doing could render an affirmative judgment against the claimant and that claimant by filing his claim had consented, at least to that extent, that such power could be so exercised.(13) The court pointed out that the claim was in an equity forum and no trial by jury was necessary therein, and further that the claimant knew the rules before he invoked the jurisdiction of the court and now must play by them.

The Supreme Court didn't have the opportunity to determine whether a non-compulsory—permissive counterclaim could be used as the basis for rendering an "affirmative" judgment against a claimant, the Trustee having elected not to bring that matter before the court.

The language of the Tenth Circuit however is clear. Unrelated claims against claimant, asserted by way of counterclaim by Trustee "are not within the Referee's summary jurisdiction and a claimant does not consent to the exercise of the bankruptcy court's plenary jurisdiction by filing his claim in the bankruptcy proceeding."(14)

The Supreme Court does state in Katchen as follows:

At page 333 -

> ". . . once it is established that the issue of preference may be summarily adjudicated absent an affirmative demand for surrender of the preference, *it can hardly be doubted that there is also summary jurisdiction to order the return of the*

(13) Katchen v. Landy, 382 U.S. at 323 at 336, note #12.
(14) Katchen v. Landy (1964), 336 F.2d 535 at page 537.

preference. This is so because in passing on 57 (g) objection, a bankruptcy court must necessarily determine the amount of preference, if any, so as to ascertain whether the claimant should return the preference, has satisfied the condition imposed by 57 (g) on allowance of the claim.

At page 334 -

"Thus, once a bankruptcy court has dealt with the preference issue, nothing remains for adjudication in a plenary suit.

"The normal rules of res judicata and collateral estoppel apply to the decisions of the bankruptcy courts.

At page 335 -

" . . . . the act does confer summary jurisdiction to compel a claimant to surrender preferences that under 57 (g) would require disallowance of the claim."

Is Katchen equally applicable to the sovereign claimant who has received a fraudulent transfer?

There are four pre-Katchen cases which deal with various facets of this question and express divergent points of view. One arose in Colorado, one in Southern California and two in New York.

First, the Colorado case. It is called In Re Ward,(15) a 1955 District Court case, and concerns a high-living, free-spending, super salesman of Hudson automobiles and his corporate structure. Both ended up in front of Referee Hilliard in Colorado.

The Government filed a claim for taxes and the claim was "contested." The dispute centered around how certain expense items were to be treated.

(15) In Re Ward, 131 Fed. Supp. 387.

The Government elected to stand on its claim and the Trustee at the hearing provided the Referee with evidence sufficient to demonstrate his contentions and indeed to show an amount due from the Government over and above the Government claim. Referee Hilliard, anticipating what he did in Katchen v. Landy, held for the Trustee and against the Government. The matter was reviewed and affirmed. Referee Hilliard had this to say:

> "Consequently, upon that testimony, and that of the attorney, it is the conclusion of the Referee that the Trustee is entitled to judgment against the United States for the amount of the claims for refund with appropriate interest."

The question of sovereign immunity arose on reconsideration and Referee Hilliard went on to say:

At page 395 -

> "Formerly the Bankruptcy Act did *not* require the United States to file claims for taxes to be due it, in substance made it the duty of the Trustee to pay any taxes which appeared to be due. The present Act, except as it awards a status of priority, PUTS THE UNITED STATES IN NO BETTER POSITION THAN ANY OTHER CLAIMANT. The Government is within the definition of 'creditor' and must file a claim in the same manner and form as other creditors, and taxes due it are provable claims.
>
> "Indeed it seems clear that the present Act was intended, based on its purpose often expressed - of equality of treatment of creditors, to give the United States no greater or less rights (the right of priority again excluded) than any others who have claims against a bankrupt's estate. Thus viewed *it must be held that it was the intention of Congress to waive the immunity*

> *of the United States from suit in matters arising out of the participation of the United States as a claimant in a bankruptcy proceedings.* (emphasis added)
>
> "Otherwise stated, Congress by the terms of the Bankruptcy Act has conferred jurisdiction of the Bankruptcy Act to entertain suits against the United States as it may against any other creditor.
>
> "If this were not so, the Government would be in a position to 'reach out with Briarean arms to gather the benefits' . . . and then draw back under the protection of its sovereign immunity, even while an accounting upon its claim before the Referee in bankruptcy is in progress."

Referee Hilliard then relies upon 68a, the set-off provision of the act saying the same is applicable and that the Government can consent to jurisdiction and by its act or failure to act did so in this instance.

He also indicates the issue could have been decided in another forum by Trustee initiative but finds consent and concurrent power to so decide relying on the *Kresge and Hillman* cases. (16)

The Ninth Circuit in 1958 had occasion to examine a case which arose in the Southern District of California. The case was Danning v. U.S.A., (17) and it was the Trustee who appealed the matter.

The Court states at page 305 -

> "There is but one question involved in this case. Does a court of bankruptcy have jurisdiction to hear and determine a counterclaim for affirmative relief asserted by a Trustee in Bank-

(16) Florance v. Kresge, 4 Cir., 93 F.2d 784. Alexander v. Hillman, 296 U.S. 222, 56 S.C. 204, 80 L.ed. 192.

(17) Danning v. United States of America (1958), 259 F.2d 305, Cert. denied 359 U.S. 911 (3 L.ed. 2d 574) (79 S.C. 587).

rupty against the United States arising out of the same transaction as the claim filed by the Government in the bankruptcy proceeding."

Circuit Judge Barnes speaking for the Court points out the parties concede that if the Government were not a party claimant the Court could render a judgment against the claimant on a counterclaim, anticipating the Supreme Court in Katchen.

The question is whether the doctrine of sovereign immunity overcomes that rule and requires a dismissal, the same alleged to be an *unconsented* claim against the Government.

The Circuit Court concludes after reviewing, questioning, and distinguishing Referee Hilliard's In Re Ward case, that the Government is indeed immune from a Bankruptcy Court imposed affirmative judgment. It should also be noted certiorari was denied by the *Supreme Court.*

The Court states at page 309 -

"Express statutory consent to suit is essential to avoid the claim of the sovereign. The consent may not be found by implication in statutory provisions that omit all refernce to the sovereign." Cf. United States v. Sherwood, 1941, 312 U.S. 584, 61 S.Ct. 767, 85 L.ed. 1058. Consent given by one statute and not given in another raises a legitimate inference that such legislative amendment was by design, not by inadvertence. Cf. Johansen v. United States, 1952, 343 U.S. 427, 72 S.Ct. 849, 96 L.ed. 1051.

"It is doubtful if any court could by interpretation of or implication from legislation alone, create a consent that was not specifically enunciated by the Congress. Only Congress has the power to grant jurisdiction over the sovereign.

"Failing to find a specific statutory waiver, and having no power to find one by implication or interpretation, we are bound by a long line of cases to hold that an affirmative judgment against the United States cannot be entered on a counterclaim without specific statutory authorization for affirmative relief against the Government on the counterclaim as such. United States v. United States Fidelity & Guaranty Co., supra; United States v. Shaw, supra; Nassau Smelting & Refining Works v. United States, 1924, 266 U.S. 101, 45 S.Ct. 25, 69 L.ed. 190; United States v. Merchants Transfer & Storage Co., 9 Cir., 1944, 144 F.2d 324; In re Clayton Magazines, 2 Cir., 1935, 77 F.2d 852, 854.

"This does not mean that a party sued by the Government may not recoup or set-off, United States v. United States Fidelity and Guaranty Co., supra., at 511, or that the Government's claim may not be contested, Gardner v. State of New Jersey, 1947, 329 U.S. 565, 67 S.Ct. 467, 91 L.ed. 504.

"Nor is there merit to appellant's position that having once filed a claim, the sovereign is in the same position as a private suitor. United States v. Shaw, supra, and cases cited therein; United States v. United States Fidelity & Guaranty Co., supra; see also Case v. Terrell, 1870, 11 Wall. 199, 78 U.S. 199, 20 L.Ed. 134; United States v. Eckford, 1867, 6 Wall. 484, 73 U.S. 484, 18 L.ed. 920. *As already illustrated, affirmative recovery against the sovereign is not a corollary of the sovereign's right to sue or present a claim for bankruptcy adjudication.*" (emphasis added)

The Court refers to and carefully distinguishes one of the New York cases, *United States v. Roth.*(18)

(18) United States v. Roth, 164 F.2d 575 (1948).

In Roth, the claim was for taxes. The Trustee asserted "set-offs" consisting of an overpayment on a prior tax and a payment while insolvent.

The Court said at page 577 -

"On this appeal we are not concerned with the validity of the asserted set-offs but only with whether they are cognizable in a court of bankruptcy. With respect to the alleged over-payment on the 1937 income tax it may be noted that before adjudication as a bankrupt Flato had filed a timely claim for refund. The claim was rejected by the Commissioner by letter to the bankrupt's trustee dated February 9, 1944. Concededly this matured the trustee's right to sue the United States, but the appellant contends that suit on such a claim can only be brought in the Court of Claims or the District Court, and that the United States cannot be called to account in a court of bankruptcy, because of the well settled rule that suits against the Government must be specifically authorized, and that the ban extends to set-offs and counterclaims as well as to original actions. United States v. Shaw, 309 U.S. 495, 500, 60 S.Ct. 659, 84 L.ed. 888; Nassau Smelting & Refining Works v. United States, 266 U.S. 101, 106, 45 S.Ct. 25, 69 L.ed. 190; In re Clayton Magazines, Inc., 2 Cir., 77 F.2d 852, 854, Section 68, sub. a, of the Bankruptcy Act, 11 U.S.C.A. Sec. 108, sub. a, quoted in the margin, deals with set-offs and does not specifically name the United States. Before the amendment of the Act in 1938 that might have been an insuperable objection to allowance of a set-off against a tax claim, because prior to that amendment section 64, sub. a did not classify taxes as "debts" but merely directed the court to "order the trustee to pay all taxes legally due and owing by the bankrupt to the United States" and, as an incident, to decide any question "as to the

amount or legality of any such tax". By the 1938 amendments, however, taxes were classified as "debts" within section 64, sub. a, 11 U.S.C.A. sec. 93, sub. n, was broadened to include "all claims" of the United States and require them to be "proved and filed in the manner provided in this section." Subdivision a of section 57, 11 U.S.C.A. sec. 93, sub. a, provides that a proof of claim shall state among other matters *"that the claim is justly owing from the bankrupt to the creditor"*; and the forms for proof of claim prescribed by the Supreme Court pursuant to authority conferred by section 30 of the Act, 11 U.S.C.A. sec. 53, require the creditor to declare *"that there are no set-offs or counterclaims to said debt"*. Thus it is apparent that the Act, as it now stands, treats the tax claim as a debt and the United States as a creditor which, like other creditors, must make proof of claims on a form containing a statement about set-offs. Sectio 68, sub. a, 11 U.S.C.A. sec. 108, sub. a, permiting set-offs, must be construed in harmony with other provisions of the Act. *By reason of the 1938 amendments discussed above, the absence of a specific reference to the United States in the set-off section can no longer be deemed significant.* Consequently, we are able to find legislative authorization for set-offs against claims tax claims of the United States. This result is inconsistent with the decision of the Third Circuit in Re Monongahela Rye Liquors, 141 F.2d 864, but apparently the argument based on the 1938 amendments, which we have found persuasive, was not there presented".

The *fourth case* is one called Matter of Techcraft, Inc., Bankrupt,(19) a 1959 case in the Southern District of New York:

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(19) Matter of Techcraft, Inc., 177 F.Supp. 790 (1959).

In that case it was determined that an order disallowing a tax claim purusant to section 57 (g) unless an amount due from the United States was paid over was *not* an affirmative judgment against the United States.

Thus it appears:

1. The Court has the power and indeed the duty to consider the claims of the sovereign and Trustee raised objections as to their propriety.

2. The Court can determine the existence of a "set-off" if one in fact exists and can reduce the claim of the sovereign up to the amount of the set-off.(20)

3. The Court can "disallow" a sovereign claim pending payment into the estate of a 57 (g) preference.(21)

4. The Ninth Circuit held pre-Katchen that the Bankruptcy Court is without power to render an affirmative judgment against the sovereign on a Trustee's counterclaim to a sovereign claim.(22)

The United States District Court for the District of Colorado held pre-Katchen that the Bankruptcy Court has power to render an affirmative judgment against the sovereign on a Trustee's counterclaim to a sovereign claim.

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(20) United States v. Roth, supra.

(21) Matter of Techcraft, Inc., supra.

(22) Danning v. U.S.A., supra. See also U. S. v. U. S. Fidelity & Guaranty, 209 U.S. 506. But see also Moskowitz v. Nelson, 218 F. Supp. 710 (1963)(E.D .Wis.) where the Court found "consent to suit" under section 67 and 60 of the Act. See also 28 U.S.C.A. 1346 (Tucker Act) which provides for jurisdiction in the District Courts of the United States of "Any other civil action or claim against the United States, not exceeding 10,000 in amount, **founded** either upon the constitution **or any act of Congress** xxx xxxx." See also 13(d) F.R.C.P. which says, "Counterclaim against the United States: These rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the United States or any officer or agency thereof."

If Danning be followed, the Bankruptcy Court in discharging its statutory duties in processing a claim of the sovereign claimant to which objection be made by way of counterclaim could well be in the anomalous position of passing on questions and making findings and conclusions which could well show that the sovereign claimant *ought* to disgorge a 57(g) preference but be without power to tell the sovereign claimant it *must* disgorge.

All of the persuasive reasons set forth in Katchen by the Supreme Court—economy, equality before the law, doing complete equity, expeditious action, minimizing costs and "once decided what remains to be done" are as equally *applicable* in dealing with the sovereign as with Mr. Katchen or any other creditor.

The essential question is whether the sovereign has consented to be sued for 57(g) acts. If consent be present, then in line with Katchen v. Landy this forum has the power to order the sovereign to disgorge.

I have no doubt that the duty imposed on this Court by §57(g) of the Act to disallow the claim of a non-disgorging 67(d) transferee should be applied in the instant case. Thus the claim of claimant as amended should be disallowed unless such claimant shall surrender $65,072.65, being that amount not barred by the statute of limitations, and pay the same into this Court by depositing the same with the Trustee on or before thirty (30) days from the date a formal order is entered in this matter.

And while I have real doubts that the sovereign has expressly consented to be sued as a fraudulent transferee

under the Bankruptcy Act, I am going to hold that it has so consented in reliance on In Re Ward, the District Court case arising in the Tenth Circuit and in the belief that all of the persuasive reasons set forth in Katchen for the Bankruptcy Court processing 57(g) objections to their conclusion as a matter of sensible judicial administration are as equally applicable to the sovereign claimant as any other creditor.

It would be manifestly unfair to all creditors for this, an equity forum, to allow the sovereign claimant to be unjustly enriched at the expense of creditors by allowing the sovereign to retain what the Congress and the Supreme Court have said other creditor transferee's must disgorge.

The nature of the condemned act of transfer is not sanitized merely because the sovereign is the transferee. If Katchen is not applicable to the sovereign, it certainly ought to be.

Thus, in my opinion, the Trustee should have judgment against claimant on its counterclaim for the sum of $65,072.65, and after receiving payment of the same that the claim of sovereign claimant be allowed and paid in the course of administration herein.

Attorney for the Trustee to prepare proposed Findings of Fact, Conclusions of Law and Order of Judgment with copies to the interested parties.

Dated this 22 day of September, 1969.

/s/ Bruce S. Jenkins
Referee in Bankruptcy

APPENDIX C

SECTION FIFTY-SEVEN (11 U.S.C. § 93)

§ 57. Proof and Allowance of Claims. a. A proof of claim shall consist of a statement, in writing and signed by a creditor, setting forth the claim; the consideration therefor; whether any and, if so, what securities are held therefor; and whether any and, if so, what payments have been made thereon; and that the claim is justly owing from the bankrupt to the creditor. A proof of claim filed in accordance with the requirements of the Bankruptcy Act, the General Orders of the Supreme Court, and the official forms, even though not verified under oath, shall constitute prima facie evidence of the validity and amount of the claim.

b. Whenever a claim is founded upon an instrument of writing, such instrument, unless lost or destroyed, shall be filed with the proof of claim. If such instrument is lost or destroyed, a statement of such fact and of the circumstances of such loss or destruction shall be filed under oath with the claim. After the claim is allowed or disallowed, such instrument may be withdrawn by permission of the court upon leaving a copy thereof on file with the claim.

c. Proofs of claim may, for the purpose of allowance, be filed by the claimants in the court of bankruptcy where the proceedings are pending or before the referee if the case has been referred.

d. Claims which have been duly proved shall be allowed upon receipt by or upon presentation to the court, unless objection to their allowance shall be made

by the parties in interest or unless their consideration be continued for cause by the court upon its own motion: *Provided, however,* That an unliquidated or contingent claim shall not be allowed unless liquidated or the amount thereof estimated in the manner and within the time directed by the court; and such claim shall not be allowed if the court shall determine that it is not capable of liqiuidation or of reasonable estimation or that such liquidation or estimation would unduly delay the administration of the estate or any proceeding under this Act.

e. Claims of secured creditors and those who have priority may be temporarily allowed to enable such creditors to participate in the proceedings at creditors' meetings held prior to the determination of the value of their securities or priorities, but shall be thus temporarily allowed for such sums only as to the courts seem to be owing over and above the value of their securities or priorities.

f. Objections to claims shall be heard and determined as soon as the convenience of the court and the best interests of the estates and the claimants will permit.

g. The claims of creditors who have received or acquired preferences, liens, conveyances, transfers, assignments or encumbrances, void or voidable under this Act, shall not be allowed unless such creditors shall surrender such preferences, liens, conveyances, transfers, assignments, or encumbrances.

h. The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors, or

by such creditors and the trustee by agreement, arbitration, compromise or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance. Such determination shall be under the supervision and control of the court.

i. Whenever a creditor whose claim against a bankrupt estate is secured, in whole or in part, by the individual undertaking of a person, fails to prove and file that claim, that person may do so in the creditor's name, and he shall be subrogated to the rights of the creditor, whether the claim has been filed by the creditor or by him in the creditor's name, to the extent that he discharges the undertaking except that in absence of an agreement to the contrary, he shall not be entitled to any dividend until the amount paid to the creditor on the undertaking plus the dividends paid to the creditor from the bankrupt estate on the claim equal the amount of the entire claim of the creditor. Any excess received by the creditor shall be held by him in trust for such person.

j. Debts owing to the United States or to any State or any subdivision thereof as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued on the amount of such loss according to law.

k. Claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part according to the equities of the case, before but not after the estate has been closed.

l. Whenever a claim shall have been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the claim if rejected in whole, or the proportional part thereof if rejected only in part, and the trustee may also recover any excess dividend paid to any creditor. The court shall have summary jurisdiction of a proceeding by the trustee to recover any such dividends.

m. The claim of any estate which is being administered in bankruptcy against any like estate may be proved and filed by the receiver or trustee and allowed by the court in the same manner and upon like terms as the claims of other creditors.

n. Except as otherwise provided in this Act, all claims provable under this Act, including all claims of the United States and of any State or any subdivision thereof, shall be proved and filed in the manner provided in this section. Claims which are not filed within six months after the first date set for the first meeting of creditors shall not be allowed: *Provided, however*, That the court may, upon application before the expiration of such period and for cause shown, grant a reasonable fixed extension of time for the filing of claims by the United States or any Sate or any subdivision thereof: *Provided further*, That the right of infants and insane persons without guradians, without notice of the bankruptcy proceedings, may continue six months longer: *And provided further*, That a claim arising in favor of a person by reason of the recovery by the trustee from such person of money or property, or the avoidance by the trustee of a lien held by such person, may be filed within

thirty days from the date of such recovery or avoidance, but if the recovery is by way of a proceeding in which a final judgment has been entered against such person, the claim shall not be allowed if the money is not paid or the property is not delivered to the trustee within thirty days from the date of the rendering of such final judgment, or within such further time as the court may allow.

SECTION SIXTY-SEVEN (11 U.S.C. § 107)

§ 67. Liens and Fraudulent Transfers.

d. (1) For the purposes of, and exclusively applicable to, this subdivision d: (a) "Property" of a debtor shall include only his nonexempt property; (b) "debt" is any legal liability, whether matured or unmatured, liquidated or unliquidated, absolute, fixed, or contingent; (c) "creditor" is a person in whose favor a debt exists; (d) a person is "insolvent" when the present fair salable value of his property is less than the amount required to pay his debts; and to determine whether a partnership is insolvent, there shall be added to the partnership property the present fair salable value of the separate property of each general partner in excess of the amount required to pay his separate debts, and also the amount realizable on any unpaid subscription to the partnership of each limited partner; and (e) consideration given for theproperty or obligation of a debtor is "fair" (1) when, in good faith, in exchange and as a fair equivalent therefor, property is transferred or an antecedent debt is satisfied, or (2) when such property or obligation is received in good faith to secure a present advance or antecedent debt in an amount not disproportionately small as compared with the value of the property or obligation obtained.

(2) Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition initiating a proceeding under this Act by or against him is fraudulent (a) as to creditors existing at the time of such transfer or obligation, if made or incurred without fair consideration by a debtor who is or will be thereby rendered insolvent, without regard to his actual intent; or (b) as to then existing creditors and as to other persons who become creditors during the continuance of a business or transaction, if made or incurred without fair consideration by a debtor who is engaged or is about to engage in such business or transaction, for which the property remaining in his hands is an unreasonably small capital, without regard to his actual intent; or (c) as to then existing and future creditors, if made or incurred without fair consideration by a debtor who intends to incur or believes that he will incur debts beyond his ability to pay as they mature; or (d) as to then existing and future creditors, if made or incurred with actual intent as distinguished from intent presumed in law, to hinder, delay, or defraud either existing or future creditors.

(3) Every transfer made and every obligation incurred by a debtor who is or will thereby be rendered insolvent, within four months prior to the filing of a petition initiating a proceeding under this Act by or against him is fraudulent, as to then existing and future creditors: (a) if made or incurred in contemplation of the filing of a petition initiating a proceeding under this Act by or against the debtor or in contemplation of liquidation of all or the greater portion of the debtor's property, with intent to use the consideration obtained for such

transfer or obligation to enable any creditor of such debtor to obtain a greater percentage of his debt than some other creditor of the same class, and (b) if the transferee or obligee of such transfer or obligation, at the time of such transfer or obligation, knew or believed that the debtor intended to make such use of such consideration. The remedies of the trustee for the avoidance of such transfer or obligation and of any ensuing preference shall be cumulative: *Provided, however*, That the trustee shall be entitled to only one satisfaction with respect thereto.

(4) Every transfer of partnership property and every partnership obligation incurred within one year prior to the filing of a petition initiating a proceeding under this Act or against the partnership, when the partnership is insolvent or will be thereby rendered insolvent, is fraudulent as to partnership creditors existing at the time of such transfer or obligation, without regard to actual intent if made or incurred (a) to a partner, whether with or without a promise by him to pay partnership debts, or (b) to a person not a partner without fair consideration to the partnership as distinguished from consideration to the individual partners.

(5) For the purpose of this subdivision d, a transfer shall be deemed to have been made at the time when it became so far perfected that no bona fide purchaser from the debtor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein, but, if such transfer is not so perfected prior to the filing of the petition intiating a proceeding under this Act, it shall be deemed to

have been made immediately before the filing of such petition.

(6) A transfer made or an obligation incurred by a debtor adjudged a bankrupt under this Act, which is fraudulent under this subdivision d against creditors of such debtor having claims provable under this Act, shall be null and void against the trustee, except as to a bona-fide purchaser, lienor, or obligee for a present fair equivalent value: *Provided, however*, That the court may, on due notice, order such transfer or obligation to be preserved for the benefit of the estate and, in such event, the trustee shall succeed to and may enforce the rights of such transferee or obligee: *And provided further*, That such purchaser, lienor, or obligee, who without actual fraudulent intent has given a consideration less than fair, as defined in this subdivision d, for such transfer, lien, or obligation, may retain the property, lien, or obligation as security for repayment.

(7) Nothing contained in this subdivision d shall be construed to validate a transfer which is voidable under section 60 of this Act.

APPENDIX D

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 4061. IMPOSITION OF TAX.

(a) *Automobiles.*—There is hereby imposed upon the following articles (including in each case parts or accessories therefor sold on or in connection therewith or with the sale thereof) sold by the manufacturer, producer, or importer a tax equivalent to the specified percent of the price for which so sold:

* * * *

SEC. 6416 [as amended by § 163 of the Excise Tax Technical Changes Act of 1958, P.L. 85-859, 72 Stat. 1275]. CERTAIN TAXES ON SALES AND SERVICES.

(a) *Condition to Allowance.*—

(1) *General rule.*—No credit or refund of any overpayment of tax imposed by section 4231 (4), (5), or (6) (cabarets, etc.), chapter 31 (retailers taxes), or chapter 32 (manufacturers taxes) shall be allowed or made unless the person who paid the tax establishes, under regulations prescribed by the Secretary of his delegates, that he—

(A) has not included the tax in the price of the article, admission, or service with respect to which it was imposed and has not collected the amount of the tax from the person who purchased such article, admission, or service; (B) has repaid the amount of the tax—

(i) in the case of any tax imposed by chapter 31 (other than the tax imposed by section 4041 (a) (1) or (b) (1)), to the purchaser of the article,

(ii) in the case of any tax imposed by

chapter 32 and the tax imposed by section 4041 (a) (1) or (b) (1) (diesel and special motor fuels), to the ultimate purchaser of the article, or

(iii) in the case of any tax imposed by section 4231 (4), (5), or (6) (cabarets, etc.) to the person who paid for the admission, refreshment, service, or merchandise;

(C) in the case of an overpayment under subsection (b) (2), (b) (3) (C) or (D), or (b) (4) of this section—

(i) has repaid or agreed to repay the amount of the tax to the ultimate vendor of the article, or

(ii) has obtained the written consent of such ultimate vendor to the allowance of the credit or the making of the refund; or

(D) has filed with the Secretary or his delegate the written consent of the person referred to in subparagraph (B) (i), (ii), or (iii), as the case may be, to the allowance of the credit or the making of the refund.

* * *

SEC. 6611. INTEREST ON OVERPAYMENTS.

(a) *Rate.*—Interest shall be allowed and paid upon any overpayment in respect of any internal revenue tax at the rate of 6 percent per annum.

(b) *Period.*—Such interest shall be allowed and paid as follows:

* * *

(2) *Refunds.*—In the case of a refund, from the date of the overpayment to a date (to be determined by the Secretary or his delegate) preceding the date of the refund check by not

more than 30 days, whether or not such refund checsk is accepted by the taxpayer after tender of such check to the taxpayer. The acceptance of such check shall be without prejudice to any right of the taxpayer to claim any additional overpayment and interest thereon.

SEC. 7422. CIVIL ACTIONS FOR REFUND.

(a) *No Suit Prior to Filing Claim for Refund.*—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof.

* * * * *

Treasury Regulations on Manufacturers and Retailers Excise Taxes (1954 Code) (26 C.F.R.):

§ 48.6416(a)-1 *Refund or credit of tax under chapter* 31 *or* 32.

(a) *In general.* Any claim for refund or credit of an overpayment of tax under chapter 31 (retailers excise taxes) or chapter 32 (manufacturers excise taxes) shall be made in accordance with the applicable provisions of this subpart and the applicable provisions of § 301.6402-2 of this chapter (Regulations on Procedure and Administration). A claim on Form 843 is not required in the case of a claim for credit, but the amount of the credit shall be claimed by entering such amount as a credit on a return of tax under

chapter 31 or 32, whichever is appropriate, filed by the person making the claim. * * *

* * *

(d) *Manufacturers tax under Chapter 32*— (1) *In general* — (i) *Supporting evidence required.* No refund or credit of any overpayment of tax under chapter 32 shall be allowed unless the person who paid the tax to the United States submits in support of his claim—

(a) A statement establishing that he has not included the tax in the price of the article with respect to which it was imposed and has not collected the amount of the tax from his vendee, or

(b) A statement establishing that he has repaid the amount of the tax to the ultimate purchaser of the article, or

(c) The written consent of such ultimate purchaser to the allowance of the refund or credit.

(ii) *Ultimate purchaser* — (a) *General* rule. Except as provided in (b) of this subdivision (ii), the term "ultimate purchaser", as used in subdivision (i) of this sub-paragraph, means the person who purchased the article for consumption, or for use in the manufacture of other articles and not for resale in the form in which purchased.

* * *

Treasury Regulations on Procedure and Administration (1954 Code) (26 C.F.R.):

§ 301.6416-1 *Certain taxes on sales and services.*

For regulations under section 6416, see Part 48 of this chapter (Manufacturers and Retailers Excise Tax Regulations) and Part 49 of this chapter (Facilities and Services Excise Tax Regulations).

* * *

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No. 71-740

In the Supreme Court of the United States

OCTOBER TERM, 1971

JOHN H. ALLEN, TRUSTEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The referee's memorandum opinion (Pet. App. B-1 to B-30) and the district court's order affirming the referee are not officially reported. The opinion of the court of appeals (Pet. App. A-1 to A-9) is reported at 447 F. 2d 497.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 1971, and the petition for a writ of certiorari was filed on December 6, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

55-140—72

QUESTION PRESENTED

Whether a bankruptcy court has summary jurisdiction to entertain a counterclaim by the trustee in bankruptcy against the United States for the recovery of federal taxes paid by the bankrupt within one year prior to bankruptcy.

STATUTE INVOLVED

The pertinent provisions of Sections 2a, 23, 57g and 67d of the Bankruptcy Act, as amended, are set forth in the Appendix, *infra*, pp. 7–12.

STATEMENT

Vista Liner Coast & Trailer, Inc. (Vista) was engaged in the business of manufacturing campers which are placed in the bed of pickup trucks. Between March 9, 1964, and February 18, 1965, Vista remitted to the United States $69,438.13 in excise taxes on the sale of its campers, under Section 4061 of the Internal Revenue Code of 1954 (26 U.S.C. 4061). Following the decision in *United States* v. *King Trailer Co.*, 350 F. 2d 947 (C.A. 9), in September 1965, holding that campers are not "truck bodies" within the meaning of Section 4061, the United States recognized that camper manufacturers are not, and never were, liable for the payment of these taxes (Pet. App. A–2 to A–3, B–3).

Vista was adjudicated a bankrupt in March 1965. The United States filed a proof of claim in bankruptcy for unpaid withholding of income and F.I.C.A. taxes and F.U.T.A. taxes for 1964 and 1965 in the amount of $9,569.76. The trustee objected to the gov-

ernment's claim and filed a counterclaim to recover $65,072.65 in excise taxes previously remitted by Vista within one year of bankruptcy. Alternatively, the trustee sought disallowance of the government's claim for employment taxes unless it surrendered the previously paid excise taxes (Pet. App. A–2 to A–3, B–29). The trustee never attemped to show that the excise tax cost had not been passed on to the ultimate purchasers, which is a statutory prerequisite to the refund of excise taxes previously paid by a manufacturer (26 U.S.C. 6416(a); Pet. App. A–2, B–3).

The referee held that the payments of the taxes to the United States by Vista, while insolvent and within one year of bankruptcy, constituted fraudulent transfers under Section 67d of the Bankruptcy Act, which were voidable by the trustee pursuant to Section 57g, and that the bankruptcy court had summary jurisdiction under Section 2a of the Bankruptcy Act to hear and determine the trustee's counterclaim against the United States (Pet. App. B–4 to B–30). The district court affirmed, but the court of appeals reversed, holding that the payments of the excise taxes by Vista were not fraudulent transfers and that the bankruptcy court therefore had no jurisdiction over the trustee's counterclaim (Pet. App. A–4 to A–9).

ARGUMENT

1. In his counterclaim, the trustee seeks to recover taxes alleged to have been paid erroneously by Vista prior to bankruptcy. But, where taxes have been paid

and incorporated into the Treasury prior to bankruptcy, Section 23 of the Bankruptcy Act (Appendix, *infra*, p. 9) requires the trustee to bring a plenary proceeding against the United States for their return. Section 23 vests the district court with plenary jurisdiction to determine controversies between a trustee and an adverse claimant concerning property which is not within the actual or constructive possession of the bankruptcy court subject, however, to the condition that the court's jurisdiction would be the same as if bankruptcy had not intervened. By contrast, Section 2a of the Bankruptcy Act, 11 U.S.C. 11, upon which the referee based his assertion of summary jurisdiction, limits such jurisdiction to proceedings concerning property in the actual or constructive possession of the bankruptcy court or to property held by those asserting no truly adverse claim. *Williams* v. *Austrian*, 331 U.S. 642, 650–654; *Katchen* v. *Landy*, 382 U.S. 323, 327; *Cadwell* v. *Elliott*, 319 F. 2d 598 (C.A. 9); *United States* v. *Owens*, 329 F. 2d 678, 680 (C.A. 5). See also 2 Collier, *Bankruptcy* (14th ed., 1971), Sec. 23.06[9].

Since the trustee's claim is for recovery of taxes previously paid to the United States and thus not in the possession of the bankruptcy court, it must be brought in a plenary proceeding, and such a proceeding must meet the jurisdictional conditions for obtaining a refund under the Internal Revenue Code. Those jurisdictional conditions are in Section 7422 (a) (26 U.S.C.), which requires filing of a claim for refund with the Internal Revenue Service before in-

stituting a proceeding in court,[1] and Section 6416(a)(1), which sets forth the conditions precedent to the recovery of manufacturers excise taxes claimed to have been overpaid.[2] See *United States* v. *Rochelle*, 363 F. 2d 225 (C.A. 5). It is conceded by the trustee that neither he nor Vista had met the conditions set forth in Section 6416(a)(1) (Pet. App. B-3).

2. The case does not involve, as the petitioner contends (Pet. 7–10), the question whether the bankruptcy court's summary jurisdiction, recognized in *Katchen* v. *Landy*, 382 U.S. 323, to order the surrender of a fraudulent transfer obtains when the transferee is the sovereign. As the petitioner recognizes (Pet. 7–8), the court of appeals did not need to decide that issue. The court merely held that the payments of the excise taxes, in the circumstances of this case, did not constitute fraudulent transfers. Thus, even assuming that in some circumstances the

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[1] Section 7422(a) requires that before a refund suit may be filed, the taxpayer must first file a claim for refund with the Internal Revenue Service in accordance with the applicable Treasury Regulations. Treasury Regulations on Manufacturers and Retailers Excise Taxes (1954 Code) (26 C.F.R.), Section 48.6416(a)-1(a), and (d)(1)(i), require that a claim for refund of the tax must include a statement showing compliance with the requirements of Section 6416(a)(1) of the 1954 Code.

[2] As a condition for receiving a refund of the manufacturers excise tax claimed to have been overpaid, Section 6416(a)(1) requires that the seller must show that (1) the tax was not passed on to its vendees, or (2) the taxpayer had repaid the tax to its vendees, or (3) the taxpayer had the written consent of its vendees to recover the refund. See *West* v. *United States*, 397 F. 2d 381 (C.A. 7).

bankruptcy court could order affirmative relief against the United States (cf. *Danning* v. *United States*, 259 F. 2d 305 (C.A. 9)), there was no occasion to do so in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX

Bankruptcy Act (c. 541, 30 Stat. 544; 11 U.S.C. 1):

Sec. 2 [as amended by Sec. 1, Act of June 22, 1938, c. 575, 52 Stat. 840; Sec. 2(b), Act of July 7, 1952, c. 579, 66 Stat. 420, and Sec. 1, Act of July 5, 1966, P.L. 89–496, 80 Stat. 270]. *Creation of Courts of Bankruptcy and Their Jurisdiction.*—a. The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to—

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(2A) Hear and determine, or cause to be heard and determined, any question arising as to the amount or legality of any unpaid tax, whether or not previously assessed, which has not prior to bankruptcy been contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction, and in respect to any tax, whether or not paid, when any such question has been contested and adjudicated by a judicial or administrative tribunal of competent jurisdiction and the time for appeal or review has not expired, to authorize the receiver or the trustee to prosecute such appeal or review;

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(7) Cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided, and determine and liquidate all inchoate or vested interests of the bankrupt's spouse in the property in any estate whenever, under the applicable laws of the State, creditors are empowered to compel such spouse to accept a money satisfaction for such interest; and where in a controversy arising in a proceeding under this Act an adverse party does not interpose objection to the summary jurisdiction of the court of bankruptcy, by answer or motion filed before the expiration of the time prescribed by law or rule of court or fixed or extended by order of court for the filing of an answer to the petition, motion or other pleading to which he is adverse, he shall be deemed to have consented to such jurisdiction;

* * * * *

(15) Make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this Act: *Provided, however,* That an injunction to restrain a court may be issued by the judge only;

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(20) Exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy: *Provided, however,* That the jurisdiction of the ancillary court over a bankrupt's property which it takes into its custody shall not extend beyond preserving such property and, where necessary, conducting the business of the bankrupt, and reducing the property to money, paying there-

from such liens as the court shall find valid and the expenses of ancillary administration, and transmitting the property or its proceeds to the court of primary jurisdiction;

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(11 U.S.C. 11.)

SEC. 23. [as amended by Sec. 1, Act of June 22, 1938, *supra*] *Jurisdiction of United States and State Courts.*—a. The United States district courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings under this Act, between receivers and trustees as such and adverse claimants, concerning the property acquired or claimed by the receivers or trustees, in the same manner and to the same extent as though such proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

b. Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this Act had not been instituted, unless by consent of the defendant, except as provided in sections 60, 67, and 70 of this Act.

(11 U.S.C. 46.)

SEC. 57 [as amended by Sec. 1, Act of June 22, 1938, *supra*; and Sec. 1, Act of June 12, 1960, P.L. 86-349, 74 Stat. 217]. *Proof and Allowance of Claims.*

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g. The claims of creditors who have received or acquired preferences, liens, conveyances, transfers, assignments or encumbrances, void or voidable under this Act, shall not be allowed unless such creditors shall surrender such preferences, liens, conveyances, transfers, assignments, or encumbrances.

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(11 U.S.C. 93.)

Sec. 67 [as amended by Sec. 1, Act of June 22, 1938, *supra,* and Sec. 21 (e), (f), (h), and (i), Act of July 7, 1952, *supra.*] *Liens and Fraudulent Transfers.*— * * *

* * * * * *

d. (1) For the purposes of, and exclusively applicable to, this subdivision d: (a) "Property" of a debtor shall include only his nonexempt property; (b) "debt" is any legal liability, whether matured or unmatured, liquidated or unliquidated, absolute, fixed, or contingent; (c) "creditor" is a person in whose favor a debt exists; (d) a person is "insolvent" when the present fair salable value of his property is less than the amount required to pay his debts; and to determine whether a partnership is insolvent, there shall be added to the partnership property the present fair salable value of the separate property of each general partner in excess of the amount required to pay his separate debts, and also the amount realizable on any unpaid subscription to the partnership of each limited partner; and (e) consideration given for the property or obligation of a debtor is "fair" (1) when, in good faith, in exchange and as a fair equivalent therefor, property is transferred or an antecedent debt is satisfied, or (2) when such property or obligation is received in good faith to secure a present advance or antecedent debt in an amount not disproportionately small as compared with the value of the property or obligation obtained.

(2) Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition initiating a proceeding under this Act by or against him is fraudulent (a) as to creditors existing at the time of such transfer or obligation, if made or incurred without fair consideration by a debtor who is or will be thereby rendered insolvent, without regard to his actual intent; or (b) as to then exist-

ing creditors and as to other persons who become creditors during the continuance of a business or transaction, if made or incurred without fair consideration by a debtor who is engaged or is about to engage in such business or transaction, for which the property remaining in his hands is an unreasonably small capital, without regard to his actual intent; or (c) as to then existing and future creditors, if made or incurred without fair consideration by a debtor who intends to incur or believes that he will incur debts beyond his ability to pay as they mature; or (d) as to then existing and future creditors, if made or incurred with actual intent as distinguished from intent presumed in law, to hinder, delay, or defraud either existing or future creditors.

(3) Every transfer made and every obligation incurred by a debtor who is or will thereby be rendered insolvent, within four months prior to the filing of a petition initiating a proceeding under this Act by or against him is fraudulent, as to then existing and future creditors: (a) if made or incurred in contemplation of the filing of a petition initiating a proceeding under this Act by or against the debtor or in contemplation of liquidation of all or the greater portion of the debtor's property, with intent to use the consideration obtained for such transfer or obligation to enable any creditor of such debtor to obtain a greater percentage of his debt than some other creditor of the same class, and (b) if the transferee or obligee of such transfer or obligation, at the time of such transfer or obligation, knew or believed that the debtor intended to make such use of such consideration. The remedies of the trustee for the avoidance of such transfer or obligation and of any ensuing preference shall be cumulative: *Provided, however,* That the trustee shall be entitled to only one satisfaction with respect thereto.

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(5) For the purposes of this subdivision d, a transfer shall be deemed to have been made at the time when it became so far perfected that no bona fide purchaser from the debtor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferree therein, but, if such transfer is not so perfected prior to the filing of the petition initiating a proceeding under this Act, it shall be deemed to have been made immediately before the filing of such petition.

(6) A transfer made or an obligation incurred by a debtor adjudged a bankrupt under this Act, which is fraudulent under this subdivision d against creditors of such debtor having claims provable under this Act, shall be null and void against the trustee, except as to a bona fide purchaser, lienor, or obligee for a present fair equivalent value: *Provided, however*, That the court may, on due notice, order such transfer or obligation to be preserved for the benefit of the estate and, in such event, the trustee shall succeed to and may enforce the rights of such transferee or obligee: *And provided further*, That such purchaser, lienor, or obligee who without actual fraudulent intent has given a consideration less than fair, as defined in this subdivision d, for such transfer, lien, or obligation, may retain the property, lien, or obligation as security for repayment.

(11 U.S.C. 107.)